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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/525,913

09/08/2005

Maria Francisca Holtus

0470-050645

1024

28289 7590 10/28/2008

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EXAMINER

BEKKER, KELLY JO

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

10/28/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/525,913	Applicant(s) HOLTUS ET AL.	
	Examiner Kelly Bekker	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 02 September 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 24-51 is/are pending in the application.
- 4a) Of the above claim(s) 46-50 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 24-45 and 51 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☒ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>12/23/05</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Election/Restrictions

Applicant's election with traverse of Group I, claims 24-45 and 51 in the reply filed on September 2, 2008 is acknowledged. The traversal is on the ground(s) that to examine all of the groups would not impose an undue burden on the examiner.

Regarding claims 46-48, based on applicant's arguments are convincing, thus claims 46-48 are joined with Group I and will be considered as part of the elected invention.

Regarding claims 49 and 50, applicant's argument is not found persuasive because the inventions listed as Groups I-V do not relate to a single general inventive concept under PCT Rule 13.1 because, under PCT Rule 13.2, they lack the same or corresponding special technical features as stated in the previous office action. Thus, claims 46-50 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected inventions, there being no allowable generic or linking claim.

The requirement is still deemed proper and is therefore made FINAL.

Oath/Declaration

The oath or declaration is defective. A new oath or declaration in compliance with 37 CFR 1.67(a) identifying this application by application number and filing date is required. See MPEP §§ 602.01 and 602.02.

The oath or declaration is defective because:

It was not executed in accordance with 37 CFR 1.63; the oath or declaration was not signed by all of the listed inventors.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 38-40 and 42 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term "minor amount" in claim 38 is a relative term which renders the claim indefinite. The term "minor amount" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. It is unclear as to what percentage of ingredient the term "minor amount" includes; it is unclear as to if the term includes 0% or if the term includes 15% or if the term includes the range 0-15%, or if the term has some other meaning.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 24-35, 38-43, 45, 46, and 51 are rejected under 35 U.S.C. 102(b) as being anticipated by Chmiel et al. (US 2002/0018839 A1).

Chmiel et al. (Chmiel) teaches of a foamable creamer powder for coffee beverages (Abstract). Chmiel teaches, paragraphs 0018 and 0019, that the creamer powder comprises about 0.05-0.5% coffee aroma components, about 0.01-0.1% soluble coffee solids, wherein "the remaining components include *one* or more proteins, fats, and carbohydrates", thus Chmiel teaches that the creamer contains 99.04-99.4% proteins or consists essentially of proteins and contains no added carbohydrates. Chmiel teaches that the foaming ingredient optionally contains 0% or more of additional ingredients including monoglycerides, i.e. a plasticizer and emulsifier (paragraphs 0023-0025). Chmiel teaches that the proteins included in the foaming ingredient include milk proteins, including caseinate (paragraphs 0020-0022). Chmiel teaches that the foaming powder includes a minor amount of additional ingredients (paragraph 0026).

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Chmiel teaches that the creamer powder is produced by injecting gas into the foamer composition, thus Chmiel teaches that the foamer contains vacuoles of entrapped gas (paragraph 0029).

Specifically regarding claim 33 recites, "the foaming ingredient according to claim 32, wherein the polyols or sugar alcohols are selected from the group consisting of...."; Claim 32 recites, "the foaming ingredient according to claim 24, wherein the one or more plasticizers are at least one of polyols, sugar alcohols and lipids". Due to the optional limitations recited in claim 32, polyols and sugar alcohols recited in dependent claim 32 is not a required limitation, and thus claim 32 is also included in the rejection as Chmiel teaches that the foaming ingredient includes lipids.

Specifically regarding claim 43, Applicant is reminded that a recitation of the method of making the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. One of ordinary skill in the art at the time the invention was made would expect a foamer ingredient formed by spray drying to obtain a powder, subjecting the powder to gas under pressure at an elevated temperature so that the existing powder particles take up the gas, and then cooling the powder to cure and releasing the pressure, as instantly claimed, to be structurally the same as a foaming ingredient formed by injecting gas under pressure into a homogenized solution and then spray drying the solution as taught by Chmiel (paragraphs 0028-0031), as both methods produce a spray dried powder with a gas filled void. Thus, the claimed invention is anticipated by the reference absent any clear and convincing evidence and/or arguments to the contrary.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 36 and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chmiel et al. (US 2002/0018839 A1) in view of Ginnette et al (US 2981629).

Chmiel teaches of a foaming ingredient that contains the plasticizer, monoglyceride, as discussed above. Chmiel is silent to the foaming ingredient as including 3-7% or 4-6% of a plasticizer as recited in claims 36 and 37.

Ginnette et al. (Ginnette) teaches of a foaming powder (Column 1 lines 20-60). Ginnette teaches that stabilizers, including monoglycerides are included from 0.1-5% in order to stabilize the composition (Column 5 line 46 through Column 6 line 41).

Regarding the foaming ingredient as including 3-7% or 4-6% of a plasticizer, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include 0.1-5% monoglyceride in the foaming composition as taught by Chmiel in view of Ginnette. One would have been motivated to do so in order to stabilize the foam composition as taught by Ginnette and because Chmiel teaches of a foaming composition which contains monoglyceride, but does not teach how much monoglyceride is included in the composition and because Ginnette teaches that it was known to include 0.1-5% monoglyceride in foaming compositions in order to obtain desired results.

Claims 44 and 47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chmiel et al. (US 2002/0018839 A1) in view of Scinto (EP 0813815 A1).

Chmiel teaches of a foaming ingredient for coffee beverages as discussed above. Chmiel is silent to the specific types of beverages and food products, specifically instant cappuccino, which the foaming ingredient is used in as recited in claims 44 and 47.

Scinto teaches of a foaming creamer for coffee beverages (Abstract). Scinto teaches that foaming creamers are used to simulate the foam on cappuccino type beverages (Page 2 lines 9-22).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the creamer as taught by Chmiel for a cappuccino type

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beverage as taught by Scinto. One would have been motivated to do so in order to form a final product that was cappuccino and which had simulated foam as taught by Scinto. One would have been further motivated for the beverage to be in instant form so that the consumer could instantly produce the beverage for consumption when desired.

Claims 44, 47, and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chmiel et al. (US 2002/0018839 A1) in view of Bisperink et al. (EP 1074181 A1).

Chmiel teaches of a foaming ingredient for coffee beverages as discussed above. Chmiel is silent to the specific types of beverages and food products, specifically instant cappuccino and instant milkshakes, which the foaming ingredient is used in as recited in claims 44, 47, and 48.

Bisperink et al. (Bisperink) teaches of a foaming creamer for cappuccino and milk shake beverages (Abstract and paragraph 0002).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the creamer as taught by Chmiel for a milkshake or cappuccino type beverage as taught by Bisperink. One would have been motivated to chose a particular beverage depending on the final product desired. To include the foaming ingredient as taught by Chmiel in beverages or foods which were known to include foaming ingredients would have been obvious and within the routine determination of one of ordinary skill in the art at the time the invention was made. One would have been further motivated for the beverage to be in instant form so that the consumer could instantly produce the beverage for consumption when desired.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Bekker whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/
Primary Examiner
Art Unit 1794

/Kelly Bekker/
Examiner
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